

UNITED STATES COURT OF APPEALS

August 14, 2006

TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

GERARDO OCHOA-BIRUETA,

Defendant - Appellant.

No. 05-2300

(D.C. No. CR-05-1032)

(D.N.M.)

ORDER AND JUDGMENT*

Before **KELLY, McKAY**, and **LUCERO**, Circuit Judges.**

Defendant-Appellant Gerardo Ochoa-Birueta pled guilty to an information charging re-entry of a deported alien previously convicted of an aggravated felony¹ in violation of 8 U.S.C. § 1326(a)(1) & (2), and 8 U.S.C. § 1326(b)(2).

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

** After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1(G). The cause is therefore ordered submitted without oral argument.

¹ A California conviction for possession for sale of a controlled substance for which he was sentenced to two years.

With an offense level of 21 and a criminal history category of II, he was sentenced to 41 months imprisonment (the low end of the guideline range) and two years supervised release. Counsel has filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), and sent Mr. Ochoa-Birueta a copy. This court also advised Mr. Ochoa-Birueta that any response brief was due within 30 days. Counsel also seeks to withdraw. See 10th Cir. R. 46.4(B).

Pursuant to Anders, we must conduct a “full examination of all the proceedings” to determine if Mr. Ochoa-Birueta’s appeal is wholly frivolous. 386 U.S. at 744. At sentencing, counsel argued for a sentence of one year and a day based upon several factors, including Mr. Ochoa-Birueta’s youth. The district court was unmoved and did not vary from the Guidelines sentence, although the court sentenced at the low end. Counsel identifies ineffective assistance as the one possible issue (non-meritorious) for appeal. We see no grounds for ineffective assistance here—moreover, such claims are generally better suited for review under 28 U.S.C. § 2255. See United States v. Galloway, 56 F.3d 1239, 1240 (10th Cir. 1995) (en banc). We note that Mr. Ochoa-Birueta’s sentence within the Guidelines is presumptively reasonable. United States v. Kristl, 437 F.3d 1050, 1054 (10th Cir. 2006). Based on our review of the record, we conclude there are no non-frivolous issues for appeal.

Accordingly, we DISMISS this appeal as frivolous and GRANT counsel's motion to withdraw.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge